

11
No. 2446

United States
Circuit Court of Appeals

For the Ninth Circuit.

H. VAN LUVEN, as Trustee in Bankruptcy of
the Estate of W. L. HOLMAN COMPANY,
a Corporation, a Bankrupt,
Appellant,
vs.

JUDSON MANUFACTURING COMPANY and
M. GREENBERG'S SONS,
Appellees.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation, Bankrupt.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
First Division.

Filed

JUL 31 1914

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RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States in and for
the Northern District of California, First
Division.*

No. 7936—IN BANKRUPTCY.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation,

Bankrupt.

**Praecipe for Transcript of Record for Use on
Appeal.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled matter to be used by the undersigned trustee on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under Section 24a of the Bankruptcy Act, from that certain order of the above-entitled court made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, State of California, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons.

Please include in the said transcript of record the following documents:

- (1) This Praecipe.
- (2) Statement of evidence as per statement lodged herewith or as finally settled by the District Judge.

- (3) Order of referee awarding to trustee in bankruptcy as against Judson Manufacturing Company and M. Greenberg's Sons \$3,682.82 in hands of treasurer of City and County of San Francisco.
- (4) Petition for review of order of referee. [1*]
- (5) Certificate of referee on review.
- (6) Opinion and order of District Judge reversing order of referee.
- (7) Petition for and allowance of appeal.
- (8) Assignment of errors on appeal.
- (9) Citation on appeal.

Dated June 19th, 1914.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee of the Estate
of the Above-named Bankrupt.

Receipt of a copy of the foregoing praecipe is
hereby admitted this 19th day of June, 1914.

S. ROSENHEIM,
Attorney for the Said Judson Mfg. Co. and M. Green-
berg's Sons.

[Endorsed]: Filed Jun. 19, 1914, W. B. Maling,
Clerk, at 2 o'clock and 30 min. P. M. W. B. Maling,
Clerk. By Lyle S. Morris, Deputy Clerk. [2]

*Page number appearing at foot of page of original certified Record.

(Title of Court and Cause.)

Stipulation for Diminution of Record.

It is hereby stipulated and agreed by and between Judson Manufacturing Company and M. Greenberg's Sons, and H. Van Luven, as trustee of the estate of the above-named bankrupt, that in making up the record on appeal by the said trustee in bankruptcy from the order of the above-entitled court made herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said Judson Manufacturing Co. and M. Greenberg's Sons as against the said trustee in bankruptcy the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as a stakeholder between the said parties, the clerk of the above-entitled court shall, in following the Praecipe now on file herein, omit the full title of court and cause except upon the said Praecipe, and thereafter refer to the same simply as "Title of Court and Cause," and omit all verifications and refer to the same simply as "Duly Verified," and omit from the petition to review referee's order the notice of decision and the order therein contained. [3]

Dated July 3, 1914.

SAMUEL ROSENHEIM,
Attorney for Judson Manufacturing Co. and M.
Greenberg's Sons.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
R. G. HUNT,
Attorneys for Trustee in Bankruptcy.

[Endorsed]: Filed Jul. 6, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [4]

(Title of Court and Cause.)

Approved Statement of Evidence upon Appeal.

(Judson Manufacturing Co. and M. Greenberg's Sons.)

BE IT REMEMBERED that on the 26th day of August, 1913, the controversy between the trustee in bankruptcy herein and Judson Manufacturing Company and M. Greenberg's Sons as to the title to the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as a stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons, came on regularly for hearing before Hon. Armand B. Kreft, referee in bankruptcy, the said Judson Manufacturing Company and M. Greenberg's Sons being represented by Samuel Rosenheim, their attorney, and the said trustee in bankruptcy being represented by Henry G. W. Dinkelspiel, J. M. Thomas and Reuben G. Hunt, his attorneys, whereupon the following proceedings were had:

The trustee in bankruptcy had caused to be issued upon the treasurer of the said municipal corporation an order to show cause why he should not pay over to the said trustee the said sum of \$3,682.82 alleged by the said trustee to be a part of the bankrupt's estate. The said treasurer appeared before the referee, disclaiming any interest in the said sum, but as-

serting that it was claimed by Judson Manufacturing Company [5] and M. Greenberg's Sons, and taking the position that he was a mere stakeholder between the trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons as to the said money. The said Judson Manufacturing Company also appeared before the referee and asserted title to the said sum as against the said trustee in bankruptcy.

Evidence was offered and received upon this issue, a statement of which is as follows, to wit: [6]

Testimony of Marshall A. Frank.

Direct Examination.

In this matter I acted generally for the Pacific Coast Casualty Company. The Holman Company applied to the Pacific Coast Casualty Company to give a bond guaranteeing the completion of a number of cars they were going to build for the City and County of San Francisco. After an investigation on the part of the Casualty Company it was thought safe to issue the bond, providing the money received from the city for the payment of the cars was turned over to the Casualty Company and they in turn had the opportunity of applying that money to pay for the manufacture of the cars. Mr. Riess, representing the Holman Company, accepted this condition, and these agreements dated June 11, 1912, known as Trustee's Exhibits Nos. 2 and 3, were the agreements drawn up to carry out this condition. The bond of the Casualty Company in the sum of Fifty Thousand Dollars (\$50,000) was then issued on behalf of the Holman Company for this contract and the payments

(Testimony of Marshall A. Frank.)

were made by the city to the Casualty Company. These agreements known as Trustee's Exhibits Nos. 2 and 3 were never cancelled.

There were some later proceedings in the matter between the Casualty Company and the creditors in which I represented [7] the Casualty Company. The creditors appointed a committee, and they wanted the right to distribute the fund that was coming into the hands of the Casualty Company instead of the company making that distribution, and an agreement in writing was made by which the money that was to be paid to the Pacific Coast Casualty Company could go to the committee of creditors and be disbursed by them in place of the company making the disbursements. The moneys were distributed after that by the committee.

Q. For what purpose did the Casualty Company receive this money from the city under the contract?

A. For the purpose of paying the people that furnished material and labor in the construction of the cars.

Q. Was that the reason and intent of making the agreements of June 11, 1912, that you have testified about? A. Yes.

Q. Was the object that the Casualty Company wanted to protect itself on its bond as against claims that might be made by these people against the Casualty Company by reason of the bond having been given? A. That was one object.

Q. Yes, and that the claims of these creditors should be paid?

(Testimony of Marshall A. Frank.)

A. Yes; that is, the creditors of the cars.

Q. These creditors who had furnished materials and labor that went into the cars? A. Yes.

Q. Well, was the object of the agreement the protection of the creditors who might furnish materials for the construction of the cars? A. Yes.

Cross-examination.

Q. When the Holman Company approached you to write a [8] bond for them and you asked them for the execution of the agreements known as Trustee's Exhibits Nos. 2 and 3, did you ask them for these instruments for your own protection or for the protection of the creditors? A. Well, for both.

Q. What relation did you have to the creditors?

A. Our relation with the creditors was this: That we had told a good many people that were going to furnish material to be used in the construction of these cars, that we would receive the payments and would see that they were paid.

Q. Did you have any written agreement or any agreement? A. No.

Q. Was there any contract of any kind between you and the creditors?

A. There was only a moral obligation, but it was never carried out to our understanding.

Q. Supposing that the Holman Company had defaulted in its contract with the city and the entire amount in your hands, remaining in your hands, collected from the city, was due the city for a breach of this contract with the Holman Company, would

(Testimony of Marshall A. Frank.)

you have retained that money for your own protection or would you have still paid it to the creditors?

A. Well, I would have to be governed by circumstances in a case of that kind. That would all depend upon which obligation we considered to be the paramount one, to protect ourselves or to protect the people that we said we were going to protect.

Q. And was the purpose of making this contract to protect yourself or to protect others?

A. To protect both.

Q. If the purpose was to protect both, then if the [9] creditors' claims in this matter amounted to more than your claim would you pay the creditors?

A. That I could not answer.

Q. Your agreement with the Holman Company provided that you should collect your money in the name of the Holman Company? A. Yes.

Q. And that the money should be deposited in the bank and distributed on checks signed by you and by the Holman Company? A. Yes.

Q. Now, was it your object in doing that to handle the money on behalf of the Holman Company, to see that it went to the proper channels?

A. Yes, that was one of the objects.

Q. Did you receive any collateral or security for the writing of the bond? A. None whatever.

Q. Didn't you regard these agreements as your collateral security?

A. Well, they were neither collateral nor security. They were simply orders to collect money so that we could see that the people who furnished material

(Testimony of Marshall A. Frank.)

were paid. I would not regard them either as collateral or security. I testified here before the referee about the first of May in this bankruptcy matter.

Q. Did you or did you not on Thursday, the first day of May, in this bankruptcy matter before the referee, in answer to a question of the trustee, regarding Trustee's Exhibit No. 5, the agreement in which you agreed to turn over all money to the creditors:

"Q. What was the occasion of the Casualty Company entering into this agreement?" say as follows:

"A. Well, the City and County of San Francisco, through its representatives, demanded that it be done; that we had no right to distribute the money, [10] or keep the money of the creditors; that they should make their own distribution."

A. I can't recollect my answer.

Q. Did you or did you not at the same place and time in answer to a question of the trustee: "Q. What do you mean by saying that they should make their own distribution?" say as follows: "A. Well, the creditors thought that they were entitled to it and that it ought to be paid to them. They contended and the City and County contended that the Casualty Company should give the money to the creditors, in other words, its collateral that it had received for the writing of the bond should be turned over to the creditors; that is, those creditors who furnished material and labor for the cars. The city assumed the position that it was getting the cars and that it was its duty to see that the money for the cars went to those people who furnished the labor for the cars."

(Testimony of Marshall A. Frank.)

A. This is apparently from my testimony. I will admit it as such, but I don't remember my answers after four months to these questions.

Q. Will you state that you received no collateral security?

A. Well, I do not say so there. I call it collateral. That does not make it collateral. As a matter of fact, if in April I thought it was collateral, to-day I would not think it so.

Q. What did you mean in April by the word "collateral" that was in your answer?

A. I was designating something that the company took for its protection and I called it collateral.

Q. What was it that the company took for its protection in this case?

A. These two agreements, Trustee's Exhibits Nos. 2 and 3. [11]

Q. Then did you also refer at that hearing to Trustee's Exhibits Nos. 2 and 3 as security?

A. I testified to that.

Q. If at that hearing to which I refer you spoke of the security which you received for the writing of this bond, you meant these two agreements, Trustee's Exhibits Nos. 2 and 3? A. Yes.

Redirect Examination.

I attended all the conferences in respect to the matter of the Union Iron Works taking over the Holman Company contract. The city forced the Holman Company to make a contract with the Union Iron Works to complete the twenty-three cars. The Holman Company entered into that contract with the

(Testimony of Marshall A. Frank.)

Union Iron Works on the basis that the Union Iron Works would construct the cars and would take over all material that had been delivered to the Holman Company intended to be used on these twenty-three cars and that the Union Iron Works would pay for that material. This was agreed to at a conference sometime in the Mayor's office, January, 1913. The Union Iron Works agreed to take over and complete the twenty-three cars and they were to receive the amount of money that was to come to the Holman Company if the Holman Company had completed the cars. They also agreed to take over any material that had been delivered to the Holman Company for the twenty-three cars and any that had been contracted for by the Holman Company and pay for it. They were to build the cars without making any charge against the Holman Company whatever excepting for the erection of a shed for which the company was to allow them \$5,000, but with the understanding that if the Union Iron Works made a profit, this \$5,000 charge was not to be made, and with that understanding we left the office of the Mayor and the *Union Works* proceeded [12] to build the cars. To the best of my knowledge, the Union Iron Works took over the material. After that time some written agreement was made between the Union Iron Works and the Holman Company which was shown to me by Mr. Moses, and it was not made in accordance with my understanding of what was going to be done. The attorney for the Holman Company who drew up the agreement with the Union

(Testimony of Marshall A. Frank.)

Iron Works showed it to me after it was executed and I told him that it was not satisfactory to me, that it was not my understanding and not in accordance with the arrangements with the Holman Company; that the agreement provided that instead of the Union Iron Works paying this money for these materials to the creditors who ought to be protected, it provided that the money should be paid to the Holman Company. I said: "I don't know who this is going to go to. I don't know who is going to make up the losses of the people who furnished material to you for the twenty-three cars and furnished them to the Union Iron Works and gave orders to these people so that they will get the money and the Union Iron Works will get it; because I feel certain obligations to those creditors, that is, those who have furnished material for the twenty-three cars." The old creditors I did not care anything about. It was in relation to this contract. I told him: "I want you to carry out your contract," and he said he would do so. I understand that the Holman Company did furnish to the Union Iron Works a list of such creditors who had furnished it with material, and that the Holman Company did give orders on the Union Iron Works, and that the Union Iron Works refused to pay the Holman Company the amount agreed upon in the agreement, because they had to hold out \$5,000 that had to be provided for in some way. So that had to be reduced to a sufficient extent to provide for that until such time as the contract was completed. Then on the completion of the contract if

(Testimony of Marshall A. Frank.)

there was [13] a profit of \$5,000 that would be available, the creditors would be entitled to the \$5,000. Of course, this only refers to the twenty-three cars.

Mr. ROSENHEIM.—Q. At this conference at the Mayor's office was it understood that the Union Iron Works would pay the creditors for the value of the materials turned over to them for the contract of the 23 cars? A. Yes.

Mr. HUNT.—We object to that as incompetent, irrelevant and immaterial. It is a matter purely between the Holman Company and the Union Iron Works.

The REFEREE.—The objection is overruled. The objection that it is incompetent, irrelevant and immaterial is overruled.

Mr. HUNT.—I will object on the ground that it is asking for a conclusion of the witness as to what took place. I think he should testify as to what was said and done.

The REFEREE.—The latter objection is sustained. The creditors present at the conference wanted to know how they were going to get their money for the material that was furnished to the twenty-three cars, and one man said: "I furnished all material for the twenty-three cars. That has been given to the Holman Company," and Mr. McGregor of the Union Iron Works told him: "We will take over that material and pay for it. It has already been delivered. It will save us the trouble of buying it and waiting for it to be manufactured. It will

(Testimony of Marshall A. Frank.)

facilitate the building of these twenty-three cars."

Q. Then Mr. McGregor said the Union Iron Works would take over the material on hand? A. Yes.

Q. For the construction of the twenty-three (23) cars and the Union Iron Works would pay for it?

A. Yes.

(Witness continuing:) And that conversation was all taken down in shorthand, and there were two (2) reporters [14] present when these conferences occurred. I do not know the names of the reporters who took down the testimony, but it was taken down in the Mayor's office in shorthand; all of these conferences were reported. I think there were always two (2) reporters present taking down the conference. I don't think any statement was made as to how the money would be paid to the Holman Company or to the creditors. I made Mr. Moses of the Holman Company send to the Union Iron Works a list of creditors who had sent their material to the Holman Company and give orders not to pay the money over to anyone else. I remember that the Judson Manufacturing Company and M. Greenberg Sons were among the creditors named in that list.

Testimony of Mountford S. Wilson.

Direct Examination.

At the time the Holman Company had completed about twenty of the forty-three cars it was evident that it would be unable to complete its contract with the city. The city arranged for the Union Iron Works to take over the contract. It was agreed that the Union Iron Works would take directly from the

(Testimony of Mountford S. Wilson.)

various supply houses and pay for it directly, the material that was to be delivered to the Holman Company. The Holman Company also had on hand a large amount of material fabricated and ready to place in the remaining cars, and the Union Iron Works agreed to take this material from the Holman Company and pay the Holman Company for it. Matters proceeded along these lines until on [15] June 30, 1913, there was due from the city to the Union Iron Works \$57,750, but just before we received that payment notices were served on the City Treasurer as follows: "M. Greenberg Sons made a claim of \$1,453.02. This amount the City Treasurer retained and also the sum of \$75.00, which he deducted from the amount due the Union Iron Works on account of costs. The Judson Manufacturing Company claimed \$2,079.80, and the Treasurer retained \$75.00 for costs. These transactions were on April 30, 1913, and these amounts were retained by the Treasurer, the total being \$4,567.54, including the costs in each case. When the Union Iron Works settled with the Holman Company for the amount which was due from the Union Iron Works to the Holman Company for the material which had been received from the Holman Company, they deducted from the amount due the Holman Company the sum of \$4,567.54, the sum retained by the city. The Union Iron Works makes a claim for this money only in the contingency that there shall be any question as to its right to deduct the \$4,567.54 in its settlement with the Holman Company. The Union Iron Works

(Testimony of Mountford S. Wilson.)

does not know that these various people that put in these stop claims furnished anything. These various supplies represented by these stop notices which were served upon the City Treasurer were materials delivered by the Holman Company to the Union Iron Works.

Cross-examination.

The Union Iron Works had entered into this contract to finish the twenty-three cars. The Holman Company stated that they had a lot of material fabricated and cut to proper shape and form for installation in these cars, and asked the Union Iron Works if they would not take that material off their hands and the Union Iron Works said they would take it off their hands, and they did. The Union Iron Works agreed to pay [16] the proper value for that material. There has been a settlement between the Union Iron Works and the Holman Company as to what the proper value was. There was a settlement when this \$4,567.50 was deducted. The Union Iron Works has no claim on this \$4,567.50 except in the event that there should be any question as to the transaction whereby the Union Iron Works deducted that amount from their account that was owing to the Holman Company for supplies. The Union Iron Works never agreed that any of the creditors should furnish the material to the Holman Company which it took over. The Union Iron Works never promised to pay any of these firms who furnished the material turned over to the Union Iron Works by the Holman Company.

(Testimony of Mountford S. Wilson.)

Redirect Examination.

I was present in the Mayor's office when the conversations took place regarding the payment for this material which was turned over to the Union Iron Works by the Holman Company. The general understanding was at the time that as to the material that had not yet been delivered by the various supply companies to the Holman Company the Union Iron Works would take that material.

Testimony of John A. McGregor.

Direct Examination.

I am the President of the Union Iron Works. In connection with this material which was on hand at the Holman Company's plant and which we could use in the construction of these cars, the Holman Company asked us if we would not take that material over at cost, plus, in the case of where it had been fabricated, the value of the labor that had been put upon it, and we said we would, and did. In this agreement it was recited that we would pay the Holman Company the agreed upon value for all of this [17] material. Subsequently, and while the cars were in the progress of construction, the Holman Company asked us if we would not assist them in paying some of their creditors, that instead of paying the amount to the Holman Company would we be good enough to pay certain creditors upon their order and deduct the amount so paid from the amount due by the Union Iron Works to the Holman Company, and we said we would be glad to oblige

(Testimony of John A. McGregor.)

them in it so far as we could, and in a number of cases we paid the creditors upon the order of the Holman Company. We recognized these orders as a payment to the Holman Company for what we owed them and deducted them from the amount we owed them. I know that the Holman Company was indebted to these creditors because a list of them had been furnished to me by Mr. Holman himself. I attended numerous conferences at the Mayor's office in reference to this matter. As a result of these conferences this agreement with the Holman Company, which is known as Trustee's Exhibit No. 7, was executed. The payments made by the Union Iron Works to creditors who presented orders were not the result of any of these conferences but were a later matter. After we had gotten the contract and taken this material from the Holman Company, Mr. Holman brought this list of creditors and stated that the creditors were oppressing him for payment and wanted to know if we would recognize orders instructing us to pay certain moneys to some of these creditors, and I said that I would be glad to accommodate them so far as I could. This was after we had executed the contract to construct these cars. I told Mr. Holman that we would not recognize any liability to these creditors, not knowing what the cars were going to cost us and how much money we would have to pay back to the Holman Company, but that if it later developed that we could instead of paying the money to the Holman Company pay it to the creditors, we would be glad [18] to do so. We

(Testimony of John A. McGregor.)

may have paid four or five thousand dollars under these orders. There was no agreement whatever that if there were money enough to pay these claims we would pay them. We offered to pay some of the claims if 10% were deducted. At that time we had received no money for the construction of the cars. We did not know if we would receive it for some time and we were under no obligation to pay either the Holman Company or recognize any order, but if the creditors would make it an object to us, we would see if we could raise the money for them and pay them less 10 or 5 per cent. We offered this to them generally as they presented themselves.

Cross-examination.

Mr. Holman showed me a list of creditors and said that if there was enough money to come from the city so that we could safely do so, we should pay the creditors upon their presenting an order. In every case checks were drawn to the Holman Company and not to any creditor that we paid. We never made any agreement to pay each or any creditor. I offered to pay them in some cases after taking off a deduction of 5 or 10 per cent. I offered to do that to Greenberg's Sons and it may have been offered to Judson Manufacturing Company. We did not offer to pay any of the old creditors of the Holman Company. Mr. Holman brought down a list of creditors which he himself had segregated into two parallel columns. Take, for instance, one of the creditors in the sum of \$250.00. Now, he said, for instance, that \$125.00 of

(Testimony of John A. McGregor.)

that amount was represented by an indebtedness for materials incurred in the construction of the first twenty cars, or an old claim, and that the other \$125.00, in his judgment, was represented by material which they had supplied for the construction of the twenty-three cars. I said that we had no money for the payment of any claims nor for the payment of [19] material that we had bought from the Holman Company. That when we got money from the city we would be glad to turn it over to the Holman Company, but if they wanted to make a deal with us we would pay them on Holman's order but would expect some consideration for advancing them the money. The Union Iron Works took over certain materials in the possession of the Holman Company, which materials were to be used in the construction of the twenty-three cars by the Union Iron Works. The Union Iron Works was to pay the Holman Company for that material, and it was not understood that the amount should go to the people who furnished those materials. The Union Iron Works did not subsequently agree to pay the money direct to the creditors who had furnished these materials.

Testimony of M. S. Greenberg.

Direct Examination.

I am in the brass foundry business. My firm's name is M. Greenberg's Sons. We had been doing business with the Holman Company for years, and after the railroad proposition Mr. Riess came and told us that he would want some material. I asked

(Testimony of M. S. Greenberg.)

him how about getting our money, and he said, "That will be all right; we have assigned all the moneys to the Casualty Company and they will pay you." So we furnished the material. That was for the first twenty cars. Then this order of delivery for the second twenty-three cars came, and Mr. Riess told me that the material for the second twenty-three cars was turned over to the Union Iron Works and they had agreed that they would take care of the creditors, and see that the material was paid for; that they would take it over, and that they would accept orders. That is what Mr. Riess told me was agreed to in the Mayor's office. The Holman Company then issued an order [20] on the Union Iron Works for 70% of the material furnished on the twenty-three cars, 30% being held up in consideration of the \$5,000 for the shed and other possible losses. We presented our order for the 70%, but Mr. McGregor told us he was under no obligation to us and he did not promise to pay, but said he would pay us if we took off 10%. We furnished \$1,453.02 worth of materials to the Holman Company that was turned over to the Union Iron Works and we received an order for 70% on that and also a letter which said: "Enclosed you will find an order for 70% and the 30% order will follow later." Of course, it never followed. This was all furnished for the construction of the second twenty-three cars. It was clearly understood that it was to be turned over to the Union Iron Works and that the Union Iron Works would

(Testimony of M. S. Greenberg.)

pay us directly. I cannot say definitely whether this material was turned over to the Union Iron Works or to the Holman Company.

Testimony of John D. Osborne.

Direct Examination.

I am the secretary of the Judson Manufacturing Company. The Holman Company owed us money when they entered into this contract to build these cars for the city, and I gave them credit for a lot of materials which were delivered to them to be incorporated in the construction of the cars. We were to have a share of the moneys that were to be due from the city at certain times as the construction of the cars progressed or as the cars were delivered. We were to be paid by the Casualty Company. When the Holman Company would deliver two or four cars the city was prepared to pay for them and would pay the money to the Casualty Company for distribution to us and to some others who had been furnishing materials. I [21] simply know these matters second-hand as an officer of the Judson Manufacturing Company. A committee was formed of the creditors and they made some sort of an arrangement with the Casualty Company to get the payment for the cars, that certain moneys were to be set aside by the city which the Casualty Company could collect and distribute, because the Casualty Company had agreed to take care of the creditors for materials supplied for the cars.

(Testimony of John D. Osborne.)

Cross-examination.

There was not to my knowledge any agreement between the Judson Manufacturing Company and the Union Iron Works regarding the payment of this money. [22]

**Notes Taken at a Meeting Held in the Mayor's Office,
City Hall, December 11, 1912, Re Geary Street
Cars Contract.**

The MAYOR.—Will you protect the Union Iron Works, Mr. Frank, on a subcontract, and let this matter of possible loss wait until they are through? I think that Mr. Frank and the Surety Company have given a bond to protect the city, and I think it is up to Mr. Frank to say: "We will step into this thing and help the city; we stand on our bond."

Mr. FRANK.—You are right; we stand on our bond.

The MAYOR.—I think you ought to step in, in the interest of the whole situation, and say: "Our position will be the same under this—"

Mr. FRANK.—It won't be the same.

The MAYOR.—It would if you make it so.

Mr. FRANK.—It would not be just to the stockholders. They are protected to-day, and you ask me to take away their protection. The city has \$70,000 with the Holman Company. Now, we make this new arrangement and you pay out the money and there is nothing to protect us. The city has property now; will continue to receive property from the Holman Company. We must at least retain 25 per cent of

the value of that property. You can figure out what the possibility of the amount of damages the city could recover. We cannot do any more than our contract calls for. Our hands are tied by the limits of the contract. We have a power of attorney to do so much. Our power of attorney says we can go so far and no further. I am simply the representative of a number of stockholders, and my place is to protect them and not to give away any of their money, or to assume obligations to put them into [23] a position different from the one they are in at the present time, because it is going to be a benefit to the city.

The MAYOR.—You should protect the city on your bond.

Mr. FRANK.—In an attempt to give you the cars I don't want to alter the position of the stockholders of the Surety Company. That is, make them no worse off than they are at the present time.

The MAYOR.—The whole proposition is this: Mr. Moses will assign twenty-three cars of his contract to the Union Iron Works, which the Union Iron Works will build and guarantee to have ready for delivery to the city by the first of March. Mr. Moses will continue the building of his ten cars and Mr. Frank agrees to the assignment. The bond stands for the protection of the city right through to the end. We look to the Holman Company and the Surety Company, as we are doing at the present time.

Mr. FRANK.—We will recognize that assignment.

The MAYOR.—Is that all satisfactory, Mr. McGregor?

Mr. MCGREGOR.—Yes.

The MAYOR.—Then, when we get through, we will take up the question of whatever the city's loss or damage is with the Holman Company and you, Mr. Frank. I am very glad to have it all settled and fixed up in this way. The Holman Company will make an assignment. In other words, the city will recognize the assignment of the Holman Company on the payments to be made to the Union Iron Works, and the payment will be made to the Union Iron Works according to the contract directly from the city to the Union Iron Works.

Mr. MOSES.—This is contingent upon the fact that there will be no objection by any of the creditors on the twenty-three cars that we deliver to the Union Iron Works, that they pay the creditors. I suppose the creditors will have no objection [24] to the Union Iron Works having the account.

The MAYOR.—It is understood that the Union Iron Works take the position of the Holman Company. I suppose Mr. McGregor will pay for all the material he uses in these cars.

Mr. MOSES.—We pay the material people direct out of their twenty-three cars. You see we have a carload of material from the eastern people that we will deliver to the Union Iron Works. They take the entire materials for the twenty-three cars and pay the creditors for the twenty-three cars.

The MAYOR.—They will take the material and pay the creditors for material that they use. The

Union Iron Works agree to that.

Mr. MOSES.—The Union Iron Works agree to which?

The MAYOR.—Have you any doubt?

Mr. MOSES.—No; but I think the creditors should be notified to that effect.

The MAYOR.—You will find the Union Iron Works ready to take care of any of these payments that fall due on any of the material they use, and you will not have any responsibility there.

Mr. McGREGOR.—I cannot see any difficulty.

The MAYOR.—Mr. Frank has been able to stand in here and help out this thing, so that whatever our losses are we will look to you or Mr. Frank at the end. [25]

Trustee's Exhibit No. 1 [Bond, W. L. Holman Co. et al.—City and County of San Francisco].

KNOW ALL MEN BY THESE PRESENTS: That we W. L. HOLMAN COMPANY (a corporation), as principal and Pacific Coast Casualty Company, a California corporation, authorized to do a general surety business, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, in the just and full sum of Fifty Thousand (\$50,000) Dollars, lawful money of the United States of America, for the payment whereof well and truly to be made, we hereby bond ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Given under our hands and sealed with out seals, this 11th day of June, A. D. 1912.

NOW, the condition of the foregoing obligation is such, that whereas, the above bounden W. L. Holman Company (a corporation) has entered into a contract, of even date herewith, with the Board of Public Works of the City and County of San Francisco, as such Board, and not otherwise, to do and perform in the said City and County the following work, to wit:

Forty-three (43) double end, pay-as-you-enter, California type motor cars, complete.

Four (4) extra trucks complete with axles, wheels and motors.

For the Geary Street Municipal Railway.
as will more fully appear from said contract (executed in triplicate), reference to which is hereby made.

NOW, THEREFORE, if the above bounden W. L. Holman Company (a corporation) shall well and truly perform, or cause to be performed, every and all of the requirements of said contract, as in the said contract set forth, then this obligation to be null and void, otherwise to remain in full force and effect.
[26] This bond is given in conjunction with and in addition to a bond of like amount, of even date herewith, covering the same contract.

W. L. HOLMAN COMPANY,

By J. W. REISS,

Vice-President.

PACIFIC COAST CASUALTY COMPANY,

By JOY LICHETNSTEIN,

Secretary.

(Contract.)

GEARY STREET RAILWAY CONSTRUCTION.
BOND ISSUE, 1910, CONTRACT No. 11
RESOLUTION OF AWARD NO. 17729.

(Second Series)

THIS AGREEMENT, made this 11th day of June, A. D. 1912, by and between W. L. Holman Company (a corporation) of the City and County of San Francisco, State of California, the party of the first part, and the BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, under and by virtue of the authority granted to it as such by Article VI of the Charter of said City and County, approved January 19th, 1899, the party of the second part, acting for and in behalf of said City and County.

WHEREAS, the said party of the first part, as will more fully appear by reference to the record of the proceedings of the Board of Public Works of said City and County, on the 20th day of May, A. D. 1912, has been awarded the contract for the work hereinafter mentioned:

NOW, THEREFORE, THESE PRESENTS WITNESSETH, That the said party of the first part, for and in consideration of the premises aforesaid, and the consideration hereinafter mentioned, promises and agrees with the said Board of Public Works, as such and not otherwise, that it will under the direction and to the satisfaction of the said Board of Public Works furnish and deliver to the said [27] City and County of San Francisco the following articles ordered by the Board of Supervisors of

said City and County, to be purchased for the Geary Street Municipal Railway, to wit: Forty Three (43) double end, pay-as-you-enter, California type motor cars, complete. Four (4) extra trucks complete with axles, wheels and motors. Said articles to be built and furnished in accordance with the plans and specifications hereunto annexed and which are hereby made a part of this contract, and the delivery of the same to be completed within one hundred and eighty (180) calendar days from the date of this contract, as specified in the notice inviting proposals therefor.

And the said Board of Public Works, in behalf of the City and County of San Francisco promises and agrees that upon the performance and fulfillment of the covenants aforesaid the said City and County will pay or cause to be paid, in the manner provided by law, to said party of the first part, for the articles aforesaid, the following prices, to wit:

Proposition "A" For furnishing and delivering double end, "Pay-as-you-enter," "California" type semi-steel motor cars complete, in accordance with the specifications. The sum of seven thousand seven hundred dollars (\$7700.00) each. For furnishing and delivering extra trucks complete with axles, wheels and motors, in accordance with the provisions of the specifications. The sum of one thousand five hundred dollars (\$1500.00) each. Progressive payments for said articles completed and ready for delivery will be made within the meaning and intent of the provisions therefor in the specifications.

Time is of the essence of this contract in all things.

It is hereby stipulated that the said party of the first part shall forfeit, as a penalty, to the said City and County of San Francisco, ten (10) dollars for each laborer, workman, or mechanic employed in the execution of this contract, by the [28] said party of the first part or by any subcontractor under said party of the first part, upon the work in this contract specified, for each calendar day during which such laborer, workman, or mechanic, is required or permitted to labor more than eight hours in violation of the provisions of an act of the Legislature of the State of California entitled "An Act limiting the hours of service of laborers, workman, and mechanics employed upon the public works of, or work done for, the State of California, or of, or for any political subdivision thereof; imposing penalties for violation of the provision of said act, and providing for the enforcement thereof," approved March 10, 1903, and of Section 653c, Penal Code of California, so far as such statutes may be applicable.

And it is further understood and agreed by and between the parties of the first and second part hereto, that this contract is entered into in compliance with, and subject to, the conditions imposed by Section 1, Chapter III, Article II, of the Charter of the City and County of San Francisco, providing that in the performance of this contract eight (8) hours shall be the maximum hours of labor on any calendar day, and that the minimum wages of laborers employed by the contractor in the execution of this contract shall be three (3) dollars a day so far as the same may be applicable. Also it is agreed

and understood by the parties to this agreement, that in no case, except where it is otherwise provided in said Charter, will the said City and County, or any department or officer thereof, be liable for any expense of the articles aforesaid.

IN WITNESS WHEREOF, The parties to these presents have hereunto set their hands and seals, and have executed this contract in triplicate, the day and year first above written.

W. L. HOLMAN COMPANY, (Seal)

By J. W. REISS, (Seal)

Vice-President,

MICHAEL CASEY, (Seal)

DANIEL G. FRASER, (Seal)

C. S. LAUMEISTER, (Seal)

Commissisoners, Board of Public Works of the City
and County of San Francisco.

Signed, sealed and delivered in the presence of
RICHARD J. CLINE. [29]

**Trustee's Exhibit No. 2 [Agreement, Dated June 11,
1912, W. L. Holman Co.—Pacific Coast Casualty
Co.].**

This Agreement made this 11th day of June, 1912, by and between W. L. HOLMAN COMPANY, a Corporation (The Principal), and PACIFIC COAST CASUALTY COMPANY, a corporation (The Surety), Witnesseth:

FOR AND IN CONSIDERATION of the Surety executing a certain bond on behalf of the Principal in favor of the City and County of San Francisco upon a contract to construct certain street cars, the

said Principal hereby appoints the Surety its Attorney in Fact and empowers it to sign in its name all demands in its favor for payments to be hereafter made by the City and County of San Francisco in connection with said contract and to receipt for and secure all such demands when payable from the Auditor of the said City and County.

The Principal further agrees that said demands are to be deposited in the Merchants National Bank and an account opened in said bank designated "W. L. HOLMAN CO., SPECIAL," into which all moneys received from the said City and County on said contract shall be paid and not withdrawn therefrom except by countersignature of the Surety or its designated representative upon the presentation of proper claim against said account incurred in connection with the performance of said contract, and after the full performance of said contract, (maintenance claims not to be considered), and the satisfaction of all claims against the Principal arising from said contract, the balance, if any, remaining in said account, to be paid to the Principal.

The Surety hereby agrees to execute the above bond and to turn said demands as received over to said Bank, the money collected therefrom to be deposited in said account, subject to the terms and conditions hereof. [30]

IN TESTIMONY WHEREOF, W. L. HOLMAN COMPANY and PACIFIC COAST CASUALTY COMPANY have caused these presents to be executed and their official seals attached by their duly

authorized officers on the day and year first herein-
above written.

W. L. HOLMAN COMPANY,
By (Signed) J. W. REISS,
Vice-President.

PACIFIC COAST CASUALTY COMPANY,
By JOY LICHTENSTEIN,
Secretary.

Accepted as to conditions governing account.

MERCHANTS' NATIONAL BANK,
By —————. [31]

**Trustee's Exhibit No. 3 [Agreement, Dated June 11,
1912, W. L. Holman Co.—Pacific Coast Casualty
Co.].**

THIS AGREEMENT, made this 11th day of June,
1912, by and between W. L. HOLMAN COMPANY,
a Corporation (the Principal), and PACIFIC
COAST CASUALTY COMPANY, a Corporation
(Surety), Witnesseth:

FOR AND IN CONSIDERATION of the Surety
executing a certain bond on behalf of the Principal
in favor of the City and County of San Francisco
upon a contract to construct certain street cars, the
said Principal hereby appoints the Surety its Attor-
ney in Fact and empowers it to sign in its name all
demands in its favor for payments to be hereafter
made by the City and County of San Francisco in
connection with said contract and to receipt for and
secure all such demands, when payable, from the
Auditor of the said City and County.

IN TESTIMONY WHEREOF, W. L. HOLMAN
COMPANY and PACIFIC COAST CASUALTY

COMPANY have caused these presents to be executed and their official seals attached by their duly authorized officers on the day and year first hereinabove written.

W. L. HOLMAN COMPANY,

By (Signed) J. W. RIESS.

PACIFIC COAST CASUALTY COMPANY,

By —————. [32]

Trustee's Exhibit No. 7 [Agreement, Dated December 17, 1912, W. L. Holman Co.—Union Iron Works Co.].

THIS AGREEMENT AND INDENTURE made and entered into this 17th day of December, 1912, by and between W. L. HOLMAN COMPANY, a corporation, party of the first part, and UNION IRON WORKS COMPANY, a corporation, party of the second part, WITNESSETH:

WHEREAS, W. L. HOLMAN COMPANY, the party of the first part hereto, did on the 11th day of June, 1912, enter into a certain contract with the Board of Public Works of the City and County of San Francisco, State of California, acting for and in behalf of the said City and County, which said contract provides, among other things, for furnishing and delivering to said City and County of San Francisco forty-three (43) double-end, pay-as-you-enter, California type motor cars, complete; said cars to be built and furnished in accordance with the plans and specifications attached to said contract, said contract and plans and specifications being hereby referred to and made part hereof.

AND WHEREAS said party of the first part has finished and delivered to said City and County Ten of said cars and is desirous of assigning to said Union Iron Works Company so much of its said contract as applies to the building and furnishing of twenty-three of the thirty-three cars not yet built.

AND WHEREAS said party of the first part has on hand certain materials bought and manufactured for installation in said cars;

AND WHEREAS said party of the first part hereto had ordered certain materials and apparatus for said twenty-three cars from the Westinghouse Electric Company and from the J. G. Brill Company, which materials and apparatus said two companies have not yet delivered to said party of the first part:

NOW, THEREFORE, in consideration of the premises and of the sum of One (\$1.00) Dollars each to the other in hand paid, the [33] receipt whereof is hereby acknowledged, the W. L. Holman Company, the party of the first part, does by these presents assign, transfer and set over to said Union Iron Works Company, the party of the second part, so much of said contract as applies to the building of twenty-three of said thirty-three cars not yet built and delivered and all of the rights to build and furnish to said City and County twenty-three of said cars, together with the right to collect and receive direct from said City and County the full sum of Seven Thousand Seven Hundred (\$7,700) Dollars for each of said twenty-three cars; and does hereby agree to sell and deliver to the said party of the second part, and the said party of the second part

does hereby agree to purchase and receive, all materials which the party of the first part now has on hand, at and for the following rates: All materials manufactured by others for twenty-three cars, at the exact invoice price for such manufactured materials, plus freight and drayage, f. o. b. shops of the party of the first part at 18th and Indiana Streets, San Francisco; as to all raw materials for the twenty-three cars, the invoice cost, plus freight and drayage f. o. b. shops of the party of the first part at 18th and Indiana Streets, San Francisco; as to all materials manufactured by the party of the first part for the twenty-three cars, invoice cost of the raw materials therefor, plus freight and drayage, f. o. b. said shops, together with such sum representing the cost of manufacturing the same as may be found to be fair and reasonable and necessarily incurred for the same.

AND said party of the first part does hereby assign, transfer and set over to said Union Iron Works Company all rights it has or may have to purchase and receive from said Westinghouse Electric Company and said J. G. Brill Company the said materials and apparatus above referred to as ordered from said Westinghouse Electric Company and said J. G. Brill Company. [34]

AND said Union Iron Work Company does hereby accept said assignment of so much of said contract as applies to twenty-three of said thirty-three cars not yet built and delivered to said City and County and the right to build and furnish to said City and County said twenty-three cars, together with the

right to collect and receive direct from said City and County the full sum of Seven Thousand Seven Hundred (\$7,700) dollars for each of said twenty-three cars; and said Union Iron Works Company agrees to purchase from said Westinghouse Electric Company and said J. G. Brill Company so much of the materials and apparatus which have been so ordered from said Companies for said twenty-three cars at the price agreed to be paid for the same by said party of the first part.

IT IS specially covenanted, agreed and understood, however, anything to the contrary in any wise herein contained notwithstanding, and whether this contract shall be partly executed or not, that this contract shall not be binding upon either party hereto and shall be of no further force or effect whatever unless said Board of Public Works, or the Board of Supervisors, acting for said City and County of San Francisco, shall ratify and approve of this assignment by said W. L. Holman Company to Union Iron Works of so much of said contract of June 11th, 1912, as will entitle said Union Iron Works Company to build and furnish said twenty-three cars, said ratification and approval to be in such form that said City and County will accept said Union Iron Works Company in the place and stead of said W. L. Holman Company in so far as said twenty-three cars are concerned and extend the time for completion of the same until March 1st, 1913, and without any penalty or forfeiture of any kind against said Union Iron Works Company unless it shall fail to deliver said twenty-three cars to said City and County on or

before the 1st day of March, 1913. [35]

AND said W. L. Holman Company does hereby specially covenant and agree that it will protect and save harmless said Union Iron Works Company of and from all damages and claims for damages, or penalties or forfeiture or losses of any and all kinds by reason of its, said W. L. Holman Company's failure to deliver thirty-three of said forty-three cars described in said contract of June 11th, 1913, to said City and County of San Francisco within the time stipulated therein.

IN WITNESS WHEREOF the parties hereto have caused their respective names and seals to be hereto signed and affixed by their respective officers thereunto duly authorized, the day and year first above written.

W. L. HOLMAN COMPANY,

By J. W. RIESS,

President.

[Seal]

By MARCUS MOSES,

Secretary.

UNION IRON WORKS COMPANY,

By JOHN A. MCGREGOR,

President.

[Seal]

By ARNOLD FOSTER,

Secretary.

It is hereby stipulated and agreed that the foregoing is a true and correct statement of the evidence in the above entitled matter.

Dated, June 30, 1914.

SAMUEL ROSENHEIM,
Attorney for Judson Manufacturing Co. and M.
Greenberg's Sons.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,
Attorneys for H. Van Luven, Trustee in Bankruptcy.

The foregoing statement of evidence is hereby approved this 30th day of June, 1914.

M. T. DOOLING,
District Judge. [36]

[Endorsed]: Filed Jun. 30, 1914, at 5 o'clock and
—— min. P. M. W. B. Maling, Clerk. By C. W.
Calbreath, Deputy Clerk. [37]

(Title of Court and Cause.)

**Order of Referee on Treasurer of San Francisco to
Pay Money to Trustee.**

H. Van Luven, the duly appointed, qualified and acting trustee of the estate of the above-named bankrupt, having filed herein on the 11th day of July, 1913, his duly verified petition praying that the undersigned referee issue an order directing the Auditor of the City and County of San Francisco, State of California, a municipal corporation, to appear before the said referee and show cause, if any there be, why he should not pay over to the said trustee the sum of \$5,367.54, moneys [38] alleged by the said trustee, in the said petition, to belong to the estate of the Bankrupt but to be in the possession, or

under the control of, the said Auditor.

And the said Auditor having filed herein his affidavit showing that the said money was not in his possession but was in the possession of the Treasurer of said municipal corporation and that the hereinafter named persons claimed the title to the same, in the amounts hereinafter set forth:

- (1) Judson Manufacturing Co.....\$2154.80
- (2) General Railway Supply Co...\$ 884.72
- (3) M. Greenberg's Sons.....\$1528.02
- (4) Taylor & Spottswood and C. H.
Evans Co.....\$ 800.00

And the undersigned referee having thereafter issued orders herein directing the said persons, and the said Treasurer, to appear before the said referee and show cause, if any there be, why the said moneys should not be paid over to the said trustee, as prayed for in the said petition, and the said Treasurer and the said persons, to wit, Judson Manufacturing Co., General Railway Supply Company, M. Greenberg's Sons, Taylor & Spottswood and C. H. Evans Co., having appeared before the said referee at the time and place specified in the said order to show cause and expressly consented to the jurisdiction of the undersigned referee to determine the said controversy.

And the said Treasurer and the said General Railway Supply Company having expressly disclaimed, in open court, any interest in the said fund, and the said Judson Manufacturing Company, M. Greenberg's Sons, Taylor & Spottswood and C. H. Evans Co., having orally petitioned the said referee that the said fund be directed paid to them in the amounts

hereinabove set forth, as against the trustee in bankruptcy.

And it appearing to the referee that of the said fund of \$5367.54 the trustee has no right, title or interest in the [39] said sum of \$800 claimed by Taylor & Spottswood and C. H. Evans Co., and a hearing having been had before the said referee as to the title to the balance of the said fund, to wit, the sum of \$3682.82, as between the said trustee in Bankruptcy and the said Judson Manufacturing Co., and M. Greenberg's Sons, and evidence both oral and documentary, having been offered and received upon the said controversy.

And it appearing to the referee that the said Judson Manufacturing Company and the said M. Greenberg's Sons have no right, title or interest in the said balance of said fund, to wit, the said sum of \$3682.82, and that the said sum of \$3682.82 and said sum of \$884.72 alleged to have been claimed by Gen. Ry. Supply Co., belong to the estate of the Bankrupt and should be turned over by the said Treasurer to the trustee in bankruptcy, as a part of such estate.

And the said referee being fully advised in the law and premises and the said controversy having been finally submitted to the said referee for decision.

IT IS HEREBY ORDERED that the petition of the said Judson Manufacturing Company and the said M. Greenberg's Sons be and the same is hereby denied, and that they, and each of them, have no right, title or interest in the said sum of \$3682.82; and

IT IS HEREBY FURTHER ORDERED that said Treasurer of the City and County of San Fran-

cisco, State of California, a municipal corporation, be and he is hereby directed forthwith to pay over to the trustee in bankruptcy herein, the said sum of \$3682.82, and the said sum of \$884.72 so disclaimed by the said General Railway Supply Company; and

IT IS HEREBY FURTHER ORDERED that the said order to show cause as to the said Taylor & Spottswood and C. H. Evans Co. be and the same is hereby dismissed.

Done in open court, this 22nd day of December, 1913.

ARMAND B. KREFT,

Referee. [40]

[Endorsed]: Filed Dec. 31, 1913. 11 A. M. A. B. Kreft, Referee. [41]

(Title of the Court and Cause.)

Petition for Review of the Order of Referee.

To A. B. Kreft, Esq., Referee in Bankruptcy:

Your petitioners respectfully show:

That your petitioners, JUDSON MANUFACTURING COMPANY and M. GREENBERG SONS, are creditors of the above-named bankrupt, and that they have filed their claims in said matter;

That on the 22nd day of December, 1913, an order, a copy of which is hereto annexed and made a part hereof, was made and entered herein by the Referee.

That such order was and is erroneous in,

1. That said Referee erred in finding that the Trustee in the above-entitled proceeding was entitled to receive the moneys in the hands of the Treasurer

of the City and County of San Francisco, as against your petitioners, to the extent of the respective claims of said petitioners;

2. That said Referee erred in finding that your petitioners were not entitled to receive and be paid out of said moneys in the hands of said Treasurer, the amount of their respective claims involved in this particular proceeding;

3. That said Referee erred as a matter of law in holding and ordering that the moneys in the hands of the Treasurer of said City and County of San Francisco should be paid to said Trustee;

4. That said Referee further erred as a matter of law in holding and ordering that your petitioners were not entitled to receive and be paid the amount of their said respective claims out of the said moneys now in the hands of [42] the said Treasurer of the City and County of San Francisco;

WHEREFORE, your petitioners feeling aggrieved because of the said order, pray that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII, so far as said order authorized the payment to said trustee out of said funds an amount sufficient to cover the amount of the respective claims of your petitioners, and also in holding that your petitioners were not entitled to receive and be paid out of said funds a

sum sufficient to cover their respective claims.

JUDSON MANUFACTURING COMPANY,

By J. D. OSBORNE,

Secretary.

M. GREENBERG'S SONS,

By MAURICE S. GREENBERG,

Of the Firm.

(Duly verified.) [43]

(Notice of Decision dated December 23, 1913, and order of referee, A. B. Kreft, dated December 22, 1913, contained in the original of this document as filed in this office, are omitted from this transcript as per "Stipulation for Diminution of Record," copy of which is included in this Transcript.)

[Endorsed]: Filed Jany. 9, 1913, 2 P. M. A. B. Kreft, Referee. [44]

(Title of Court and Cause.)

Certificate of Referee on Review.

To the Honorable MAURICE T. DOOLING, Judge
of the District Court of the United States in and
for the Northern District of California.

The undersigned, referee, to whom was referred the above-entitled matter respectfully certifies and reports:

That on the 22d day of December, 1913, I made an order directing the treasurer of the City and County of San Francisco to pay certain moneys to the trustee. The Judson Manufacturing Company and M. Greenberg's Sons, creditors of the bankrupt, feeling aggrieved thereat, on January 9, 1914, within the

time granted by the referee, filed a petition to review said order.

The question presented on this review concerns the right of said creditors to the sum of \$3,682.82 in the hands of the treasurer of the City and County of San Francisco, and which money the trustee claims should be paid to the estate of bankrupt as a sum due the bankrupt from the Union Iron Works, arising out of materials furnished to the Union Iron Works for the construction of street-cars.

The claims of these creditors were partially heard in connection with the petition in intervention of C. F. Bulotti and H. R. Noack. The rights of the creditors in both matters depend upon the same contracts, and understandings had between the bankrupt, the Pacific Coast Casualty Company, and the creditors who furnished labor and materials for the construction of the street-cars.

As a consideration of the evidence and the reasons upon which my conclusions are based are stated in my certificate upon [45] petition to review, taken by said C. F. Bulotti and H. R. Noack, which is transmitted to the Court at the same time as this certificate, it is only necessary to state certain additional facts concerning the claims of the creditors taking this review.

The bankrupt, being unable to complete its contract with the city within the time specified, the construction of twenty-three of the street-cars was turned over to the Union Iron Works Company. At that time the bankrupt had on hand certain materials which had been sold and delivered to it by

Judson Manufacturing Company and M. Greenberg Sons, and which it had intended to use itself in the construction of these cars. The bankrupt turned these materials over to the Union Iron Works, which agreed to pay the bankrupt for them and then proceeded to use them in the construction of these cars.

Prior to the final payment by the city to the Union Iron Works for the construction of these cars, the Judson Manufacturing Company and M. Greenberg Sons filed with the city stop notices in the respective amounts of \$2,154.80 and \$1,528.02, the same being the amounts of their claims against the bankrupt for these materials. The city treasurer deducted the sum of \$3,682.82 from the amount due the Union Iron Works Company and retained the same sum to cover these stop notices.

The Union Iron Works Company made a settlement with the trustee in bankruptcy in respect to the materials turned over to it by the bankrupt, and in this settlement the Union Iron Works Company was credited with this sum of \$3,682.82 and on its part surrendered to the trustee its interest in this sum.

The trustee in bankruptcy caused orders to be issued against the said city treasurer, Judson Manufacturing Company and M. Greenberg Sons, directing them to appear before the referee and show cause why this sum of \$3,682.82 should not be turned over to the trustee in bankruptcy as a part of the [46] estate of the bankrupt. These parties all appeared before the referee in response to these orders expressly consented to the jurisdiction of the

referee to determine the title to this fund of \$3,682.82 and to whom it should be paid. The city treasurer took the position that he was a mere stakeholder, while Judson Manufacturing Company and M. Greenberg Sons claimed title to the fund in the amounts above specified and prayed that it be directed paid to them in said amounts. Counsel for the city, however, stated that the city desired, before submitting to the jurisdiction of the referee, that all claimants who had filed with the city notices to withhold, should also appear before the referee and consent to his jurisdiction. Without the consent of the city and the claimants the referee would have no jurisdiction over this matter. However, all parties have appeared and expressly consented to the jurisdiction of the referee.

The position of these creditors is that all moneys coming from the city are subject to the agreements between the Pacific Coast Casualty Company and the bankrupt and the understandings had between said parties and the creditors furnishing labor and materials for the cars. The agreements between the Pacific Coast Casualty Company and the bankrupt provide that all moneys due to the bankrupt from the city shall be collected by the surety and deposited in the Merchants' National Bank to the account of W. L. Holman, Special, and not to be withdrawn therefrom except by counter-signature of the surety upon claims incurred in connection with the performance of the contract with the city, and that the fact that this sum of \$3,682.82 represents a payment from the Union Iron Works Company to the bank-

rupt for materials furnished by these creditors to the bankrupt, and turned over by the bankrupt to the Union Works, does not affect the right of these creditors to have this money applied to the payment of their claims. [47]

If an equitable assignment of the moneys to come from the city was made by the bankrupt to these creditors in the amounts of their respective claims, I would agree with counsel, that the rights of these creditors were not affected by the transfer of the property to the Union Iron Works.

For the reasons stated in my certificate on the petition to review, taken by C. F. Bulotti and H. R. Noack, I find that no such assignment was made. And the petition of these creditors that said sum of money in the amounts respectively due them be turned over to them, in my opinion, should be denied.

A transcript of the testimony and proceedings taken upon the hearing, together with the exhibits, are transmitted herewith. There was also put in evidence by stipulation of the parties a transcript of the proceedings had in the Mayor's Office upon the consideration leading up to the construction by the Union Iron Works of the twenty-three cars, which transcript of proceedings is transmitted herewith.

Respectfully submitted.

ARMAND B. KREFT,
Referee.

San Francisco, January 14, 1914.

[Endorsed]: Filed Jan. 16 1914, at 4:30 P. M.
W. B. Maling, Clerk. By Lyle S. Morris, Deputy
Clerk. [48]

(Title of Court and Cause.)

**Opinion and Order Reversing the Order of the
Referee.**

This matter comes on on the petition of C. F. Bulotti and H. R. Noak, and the petition of Judson Manufacturing Company and M. Greenberg's Sons, to review certain orders of the referee herein.

The questions involved have to do with certain moneys due from the City and County of San Francisco for the construction of certain cars by the bankrupt. The press of business and lack of time prevents me from reviewing the matters *in extenso*. I am of the opinion, however, that the contracts of June 11, 1912, and the subsequent oral construction thereof, together with the understanding prevailing among all concerned, should be held to protect those mentioned in such contracts and who furnished materials that went into the construction of the cars. The questions are not free from difficulty but if error be made I prefer to err in favor of those who acted in good faith in furnishing materials under the belief that they were protected by the contracts in question.

The orders sought to be reviewed are, therefore, reversed. April 28th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: At 5 o'clock and — min. P. M.
Filed Apr. 22, 1914. W. B. Maling, Clerk. By T.
L. Baldwin, Deputy Clerk. [49]

(Title of Court and Cause.)

**Petition for Appeal by Trustee in Bankruptcy and
Order Allowing Appeal.**

H. Van Luven, Esq., the trustee of the estate of the above-named bankrupt, considering himself aggrieved by the order of the above-entitled court made and entered herein on the 28th day of April, 1914, in the above-entitled matter, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82, held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg Sons, does hereby appeal from said order of the said Court to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated, June 19th, 1914.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee in Bankruptcy
of W. L. Holman Company, a Corporation.

The foregoing appeal is allowed.

Dated, June 19th, 1914.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Jun. 19, 1914, at 9 o'clock and
50 min. A. M. W. B. Maling, Clerk. By C. W.
Calbreath, Deputy Clerk. [50]

(Title of Court and Cause.)

Assignment of Errors on Appeal.

And now on this, the 19th day of June, 1914, comes H. Van Luven, Esq., as trustee in bankruptcy of the estate of W. L. Holman Company, a corporation, by Henry G. W. Dinkelspiel, J. M. Thomas and Reuben G. Hunt, his attorneys, and says that the order in the above-entitled matter made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of said court, awarding to the said trustee in bankruptcy as against the Judson Manufacturing Co. and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Co. and M. Greenberg's Sons, is erroneous and against

his just right for the following reasons:

(1) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons', and each of them, have no right, title or interest in the said sum of \$3,682.82, or any part thereof.

(2) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons have no lien, either legal or equitable upon the said sum of \$3,682.82, or any part thereof. [51]

(3) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons have no right, title or interest in the said sum of \$3,682.82, or any part thereof, as against the said trustee in bankruptcy.

(4) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Co. and M. Greenberg's Sons, and each of them, have no lien, either legal or equitable, upon the said sum of \$3,682.82, or any part thereof, as against the said trustee in bankruptcy.

(5) The evidence upon which the said order of the referee is based shows that the said sum of \$3,682.82 belongs to the estate of the bankrupt for the benefit of the general unsecured creditors of the bankrupt, and that the title is in the said trustee in bankruptcy.

(6) The evidence upon which the said order of the referee is based shows that the said Judson Manufacturing Company and M. Greenberg's Sons are not secured creditors of the bankrupt, as to the said

sum of \$3,682.82, or any part thereof, but are general unsecured creditors of the bankrupt as to the said sum.

(7) The evidence upon which the said order of the referee is based shows that no assignment, either legal or equitable, was ever made by the bankrupt to the Pacific Coast Casualty Co. for the benefit of its creditors furnishing material or labor for the construction of the Geary Street cars.

(8) The evidence upon which the said order of the referee is based shows that no assignment, legal or equitable, was ever made by the bankrupt for the benefit of its creditors, or any of them.

(9) The evidence upon which the said order of the referee is based shows that the title to the said sum of [52] \$3,682.82 was in the Union Iron Works Co., and not in the bankrupt, at the time the said Judson Manufacturing Co. and M. Greenberg's Sons filed their stop notices with the City and County of San Francisco against the bankrupt as to the said sum.

WHEREFORE, the said H. VAN LUVEN, as such trustee, prays that the said order of the District Judge may be reversed.

HENRY G. W. DINKELSPIEL,
J. M. THOMAS,
REUBEN G. HUNT,

Attorneys for H. Van Luven, Trustee in Bankruptcy
of the W. L. Holman Company, a Corporation.

[Endorsed]: Filed Jun. 19, 1914, at 9 o'clock and 50 min. A. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [53]

(Title of Court and Cause.)

Citation on Appeal (Copy).

The United States of America,
Ninth Circuit,—ss.

To Judson Manufacturing Company and M. Greenberg's Sons, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in said district, on the 18th day of July next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the order of the said District Court rendered in the said matter and made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the said Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [54]

Witness the Honorable M. T. DOOLING, Judge of

said District Court, this 19th day of June, in the year of Our Lord one thousand nine hundred and fourteen, and of the independence of the United States of America the one hundred and thirty-eighth.

M. T. DOOLING,

United States District Judge.

Receipt of a copy of the foregoing Citation on Appeal is hereby admitted this 19th day of June, 1914.

S. ROSENHEIM,

Attorney for the Said Judson Manufacturing Co.
and M. Greenberg's Sons.

[Endorsed]: Filed Jun. 19, 1914, at 2 o'clock and 30 min. P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [55]

Certificate of Clerk District Court to Transcript.

I, W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereto attached 55 pages, numbered from 1 to 55, inclusive, contain full, true, and correct copies of certain documents and records, etc., as the same now appear on file (with the exception of the Petition for Review of order of Referee, and Order of Referee on Treasurer of San Francisco to Pay Money to Trustee, which were originally filed with the Referee in Bankruptcy, and transmitted to this office with and as a part of Certificate of Referee on said Petition for Review), all of which are now of record in this office, in the matter of W. L. Holman, a corporation, in Bankruptcy, No. 7,936. Said Transcript of Appeal

is made up pursuant to and in accordance with "Praeceptum for Transcript of Record for Use on Appeal" and "Stipulation for Diminution of Record" (copies of which are included in this Transcript), and the instructions of Reuben G. Hunt, Esquire, Attorney for Appellant herein,—H. Van Luven, Trustee of said estate.

I further certify that the costs of preparing and certifying the foregoing Transcript of Appeal is the sum of Twenty-seven Dollars and Ninety Cents (\$27.90), and that the same has been paid to me by the attorney for appellant herein.

Annexed hereto and paged 57, 58, and 59, is the original Citation on Appeal issued herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 16th day of July, A. D. 1914.

[Seal]

W. B. MALING,
Clerk.

By Lyle S. Morris,
Deputy Clerk. [56]

Citation on Appeal (Original).

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 7936—IN BANKRUPTCY.

In the Matter of W. L. HOLMAN COMPANY, a
Corporation,

Bankrupt.

CITATION ON APPEAL.

The United States of America,
Ninth Circuit,—ss.

To Judson Manufacturing Company and M. Greenberg's Sons, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City and County of San Francisco, in said district, on the 18th day of July next, pursuant to a petition for appeal and assignment of errors filed in the clerk's office of the District Court of the United States for the Northern District of California, First Division, in the above-entitled matter, to show cause, if any there be, why the order of the said District Court rendered in the said matter and made and entered herein on the 28th day of April, 1914, reversing the order of A. B. Kreft, Esq., a referee in bankruptcy of the said court, awarding to the said trustee in bankruptcy as against the said Judson Manufacturing Company and M. Greenberg's Sons the sum of \$3,682.82 held by the City and County of San Francisco, a municipal corporation, as stakeholder between the said trustee in bankruptcy and the said Judson Manufacturing Company and M. Greenberg's Sons, as in said petition for appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. [57]

Witness the Honorable M. T. DOOLING, Judge of said District Court, this 19th day of June, in the year of Our Lord one thousand nine hundred and

fourteen and of the independence of the United States of America, the one hundred and thirty-eighth.

M. T. DOOLING,
United States District Judge.

Receipt of a copy of the foregoing Citation on Appeal is hereby admitted this 19th day of June, 1914.

S. ROSENHEIM,
Attorney for the Said Judson Manufacturing Co.
and M. Greenberg's Sons. [58]

[Endorsed]: No. 7936. In the District Court of the United States, Northern District of California. In the Matter of W. L. Holman Company, a Corporation, Bankrupt. Citation on Appeal. (Judson Mfg. Co. & M. Greenberg's Sons). Filed Jun. 19, 1914, at 2 o'clock and 30 minutes P. M. W. B. Mal-
ing, Clerk. By Lyle S. Morris, Deputy Clerk. [59]

[Endorsed]: No. 2446. United States Circuit Court of Appeals for the Ninth Circuit. H. Van Luven, as Trustee in Bankruptcy of the Estate of W. L. Holman Company, a Corporation, a Bankrupt, Appellant, vs. Judson Manufacturing Company and M. Greenberg's Sons, Appellees. In the Matter of W. L. Holman Company, a Corporation, Bankrupt. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed July 17, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit. 2